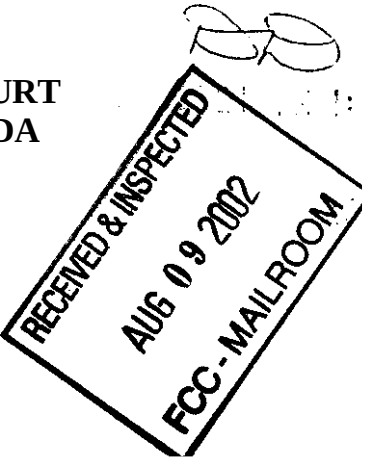
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION



JAMES J. WHITE, PERRY KRANIAS, and RALPH DELUISE,

Representative Plaintiffs,

v.

CASE NO: 97-1859-CIV-T-26C

GTE CORPORATION; GTE WIRELESS INCORPORATED, f/k/a GTE MOBILNET INCORPORATED; GTE WIRELESS OF THE SOUTH INCORPORATED, f/k/a GTE MOBILNET OF TAMPA INCORPORATED and GTE MOBILNET OF THE SOUTH INCORPORATED; GTE WIRELESS OF HOUSTON INCORPORATED; GTE MOBILNET OF CLEVELAND INCORPORATED; and GTE MOBILNET OF THE SOUTHWEST INCORPORATED,

Defendants.
_____/

O R D E R

Before the Court are the Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed **by** GTE Wireless Incorporated and GTE Wireless of the South Incorporated and the supporting memorandum (Dkts. **72** and 73), the Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed **by** Defendants GTE Corporation, GTE Wireless of Houston Incorporated, GTE Mobilnet of Cleveland Incorporated, and GTE Mobilnet of the Southwest Incorporated and the supporting memorandum (Dkts. 74

EXHIBIT 1

96

and 75), Plaintiffs' Responses (Dkts. 76 and 85), the Reply to Plaintiffs' Response to Defendants GTE Wireless Incorporated's and GTE Wireless of the South Incorporated's Dispositive Motion to Dismiss (Dkt. 86), the Memorandum Correcting Mistake Contained in Reply (Dkt. 87), Plaintiffs' Notices of Filing Supplemental Case Law (Dkts. 88 and 93). After careful consideration of the motions and the file, the Court is of the opinion that the motion to dismiss for failure to allege a claim for relief should be granted as to count II and denied as to counts I, 111, and IV. The motion to dismiss for lack of personal jurisdiction should be denied.

Allegations of the Third Amended Complaint

Plaintiffs represent a purported class of individuals of Florida residents who were cellular service customers of Defendants (GTE).[1] (Dkt. 70 at para. *25)*. GTE allegedly concealed and failed to disclose its practices of charging on a "rounded up" basis. (Dkt. 70 at para. ***26)*.** "Rounding up" means that each call is billed in whole minute increments, with any fraction of a minute being billed as a whole minute. (Dkt. 70 at para. 14). Each call begins at the time the "send" button is pushed, regardless of whether a connection is made. (Dkt. 70 at para. **14).** GTE charged Plaintiffs on a "rounded up" basis and Plaintiffs paid GTE the amount billed. The monthly bills do not disclose or explain the

[1] The Court will refer to all defendants as GTE. The part of this order addressing personal jurisdiction refers only to the non-resident defendants.

practice of "rounding up." (Dkt. 70 at para. 19). The contracts between GTE and Plaintiffs, both oral and written, did not provide "an adequate description or disclosure. . . as to GTE's Rounding Up practices." (Dkt. 70 at paras. 20 and 22). GTE induced Plaintiffs to enter into the contracts "with advertisements and materials, including, among other things, promises of free air time." (Dkt. 70 at para. 18).

In the four-count complaint, count I alleges a private action pursuant to 47 U.S.C. section 207 for a violation of the Communications Act of 1934, 47 U.S.C. section 201(b). (Dkt. 70 at para. 37). Plaintiffs assert that "[t]he practice of charging for all air time on a Rounded Up basis is unjust and unreasonable, and therefore unlawful, under the provisions of 47 U.S.C. section 201(b)." (Dkt. 70 at para. 38). Count II seeks an injunction to restrain GTE from "rounding up." (Dkt. 70 at paras. 40-44).

Count III seeks damages for breach of contract. (Dkt. 70 at paras. 45-50). GTE allegedly breached the oral and written contracts "by charging and collecting more money for cellular phone services than Plaintiffs and class members have agreed to pay." (Dkt. 70 at para. 48). Count IV constitutes a state law claim based on a violation of section 501.201, et seq., Florida Statutes, which is the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). (Dkt. 70 at paras. 51-57). Plaintiffs allege that "charging for all air time on a Rounded Up basis, without adequately disclosing such practices," amounts to unfair competition.

Plaintiffs sued a total of seven defendants. Of those seven, two are corporations

authorized to conduct business in Florida, one of which is a Florida corporation and the other a Delaware corporation. (Dkt. 70 at paras. 6 and 7). Four of the remaining five defendants are either Delaware or Texas corporations that provide cellular service throughout the United States "either directly or indirectly through its subsidiaries and affiliates." (Dkt. 70 at paras. 5, 8, 9, and 10). The last defendant is GTE Corporation, a New York corporation that not only provides cellular service throughout the United States "either directly or indirectly through its subsidiaries and affiliates," but is "the parent corporation of or is otherwise affiliated with all other Defendants." (Dkt. 70 at para. 4).

Argument

Defendants characterize Plaintiffs' claims as ones seeking a retroactive rate reduction. Defendants argue that the two state law claims (counts III and IV) are preempted expressly and completely as improper rate regulation in violation of the Federal Communications Act (FCA). As to the state law claim of breach of contract, Defendants contend that the contracts obligate Plaintiffs to pay per minute rates.

Defendants argue that the claim based on the FCA (count I) should fail because per minute billing does not constitute a per se violation and Plaintiffs have not suffered any direct injury from the billing process. As to the claim titled "injunction" (count 11), no such federal claim exists, and even if it did, Plaintiffs have an adequate remedy at law.

Plaintiffs respond that this purported class action challenges Defendants'

"fraudulent and deceptive promotiona! and contract practices, not Defendants' rates." (Dkt. 76 at 11). Plaintiffs state that they are attacking the deceptive promotional, advertising, contracting and billing practices of Defendants. They suffered injury by not receiving the full amount of allocated cellular air time elected under a contract and by being overcharged for air time used in excess of the flat-rate amount allocated under the service plan chosen.

Violation of 47 U.S.C. § 201(b)

Plaintiffs state that one of the issues in this action is whether Defendants violated 47 U.S.C. section 201(b) by "deceptively promoting, contracting and billing Plaintiffs by rounding up calls." (Dkt. 76 at 13). The complaint specifically alleges that the practice of charging for all air time by rounding up is unjust and unreasonable under section 201(b). (Dkt. 70 at para. **38).** Thus, at least in count I, Plaintiffs do not appear to be challenging the reasonableness of the rates or the failure to disclose a particular billing practice, but rather are challenging the reasonableness of the billing practice itself.

Most of the cases addressing the viability of actions based on the practice of rounding up may be divided into three categories: 1) federal cases deciding whether the FCA completely preempts state law claims for purposes of removal jurisdiction; 2) state

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[2] See, e.g., Marcus v. AT & T Corp., 138 F.3d 46 (2d Cir. 1998); Sanderson, Thompson, Ratledge & Zinny v. AWACS, Inc., 958 F.Supp. 947 (D.Del. 1997); Bennett v. Alltel Mobile Communications of Alabama, Inc., No. Civ.A. 96-D-232-N, 1996 WL

cases deciding whether a cause of action exists for breach of contract, fraud, violations of state consumer acts for fraud and unfair trade practices, and various other state law claims,[3] and federal cases addressing preemption in a non-removal setting? Of the cases addressing removal issues, the courts have found that the complete preemption doctrine, a concept associated with removal jurisdiction, does not extend to the FCA. In so ruling, some courts in dicta wrote that when a plaintiff challenges billing practices as unreasonable, as opposed to challenging improper billing based on deceptive advertising, a claim for relief for damages under section 207 of the FCA is available.[4]

1054301 (M.D.Ala. May 14, 1996); DeCastro v. AWACS. Inc., 935 F.Supp. 541 (D.N.J. 1996); In re Comcast Cellular Telecommunications Litigation, 949 F.Supp. 1193 (E.D.Penn. 1996).

[3] See, e.g., Tenore v. AT & T Wireless Services, 962 P.2d 104 (Wash. 1998), cert. denied, No. 98-947, 1999 U.S. LEXIS 1507 (U.S. Feb. 22, 1999).

[4] See In re Long Distance Telecommunications Litigation, 831 F.2d 627, 633 (6th Cir. 1987) (primary jurisdiction doctrine required referral of claim regarding reasonableness of defendant's practices to Federal Communications Commission, but state law claims for fraud and deceit based on failure to notify customers of practice of charging for uncompleted calls not preempted by FCA); Stein v. Sprint Corp., 22 F.Supp. 1210 (D.Kan. 1998) (filed-rate doctrine barred claims for fraud and breach of contract and for damages or injunction requiring certain rate be charged, but did not preempt state law claims under state statutes for injunction relating to deceptive advertising).

[5] See Sanderson, Thommon. Ratledge & Zinny v. AWACS. Inc., 958 F.Supp. 947, 955-56 (D.Del. 1997) (claims for statutory fraud and breach of contract did not challenge reasonableness of billing practice or rate and therefore did not fall within the scope of civil enforcement of FCA); In re Comcast Cellular Telecommunications Litigation, 949 F.Supp. 1193, 1203 (E.D.Penn. 1996) (true gravamen of complaint was challenge to rates and billing practices and as such action under section 207 would have been available); DeCastro v. AWACS. Inc., 935 F.Supp. 541, 550 (D.N.J. 1996) (section 207 does not provide federal cause of action for violations of a knowing failure to

After carefully considering all the cases and pertinent provisions of the FCA, this Court concludes that the FCA permits under section 207 a claim for damages for the reasonableness of a particular billing practice, such as the practice of rounding up.[6] However, this Court must invoke the doctrine of primary jurisdiction and refer the issues raised in this count to the Federal Communications Commission. See In re Long Distance Telecommunications Litigation, 831 F.2d at 629-630 (primary jurisdiction applies where claim is originally cognizable in courts but regulatory scheme requires enforcement of the claim by administrative body, quoting United States v. Western Pacific R.R., 352 U.S. 59, 63-65 (1956)).

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disclose a particular billing practice); Weinberg v. Sprint Corp., 165 F.R.D. 431,438-39 (D.N.J. 1996) (no removal jurisdiction where plaintiffs state law claims related to Sprint's advertising practices rather than the billing practice itself); Marcus v. AT & T Corp., 938 F.Supp. 1158, 1167-69 (S.D.N.Y. 1996) (common law claims arose under federal law and removal was proper).

[6] No mention of the "filed rate" or "filed tariff' doctrine has been made. If this case were governed by the filed rate doctrine, count I would be barred. See Marcus, 938 F.Supp. at 1169-70. This Court assumes that it is inapplicable because Defendants are characterized as commercial mobile radio service providers, which are specifically exempted from tariff filing requirements by the FCA. See Tenore v. AT & T Wireless Services, 962 P.2d 104, 109-10 (Wash. 1998) (citing 47 C.F.R. sections 20.15(a), (c), 20.3, and 20.9(a)). In any event, whether competition in the area of cellular telephone service necessarily makes any rate per se reasonable should be decided by the Federal Communications Commission under the doctrine of primary jurisdiction. See In re Long Distance Telecommunications Litigation, 831 F.2d 627, 631 (6th Cir. 1987) (claims based on 47 U.S.C. 201(b) are within primary jurisdiction of FCC), Kiefer v. Paging Network, Inc., 50 F.Supp. 681,682 (E.D.Mich. 1999) (reasonableness of standardized late payment charge should be referred to FCC).

Florida Deceptive and Unfair Trade Practices Act

Plaintiffs challenge the failure to disclose the billing practice of rounding up as deceptive under the FDUTPA. Applying simple preemption principles, as opposed to the complete preemption doctrine required in removal cases, the courts have found that the FCA does not preempt state law claims attacking the failure to disclose the method by which a customer's bill is determined. Because this claim appears to be one of those which are not preempted by the FCA, count IV will be permitted.

Breach of Contract

Essentially, Defendants argue that because Plaintiffs agreed to per minute billing, Plaintiffs cannot state a cause of action for breach of contract. Plaintiffs respond that although some of the customer contracts contain the term "per minute billing," that term is not defined. On balance, the Court finds that count III alleges sufficient facts **at** this stage to state a cause of action for breach of contract.

Claim for Injunction

The Court agrees with Defendants that Plaintiffs have failed to allege a cognizable claim for injunctivz relief. Plaintiffs have not persuaded this Court that a separate and independent federal claim for injunctive relief exists in this case. Plaintiffs state that they "are not specifically seeking an injunction on a federal common law theory" but that

"such relief is commonly recognized" by the state courts of Florida. (Dkt. 76 at 11). To the extent Plaintiffs seek injunctive relief pursuant to FDUTPA, they must do so in count IV.

Personal Jurisdiction over Non-resident Defendants

Plaintiffs counter the Non-resident Defendants' arguments with the fact that the contract attached to the complaint specifically defines them as parties to the contract. The customer service agreement attached as Exhibit B to the Third Amended Complaint provides that the agreement "is made by GTE Mobilnet Service Corporation, on behalf of its affiliates and subsidiaries." The complaint alleges that the Non-resident Defendants are either the subsidiaries or affiliates of GTE Mobilnet Service Corporation. (Dkt. 70 at para. 11). Defendants' counter affidavits have not shown otherwise. Consequently, this Court finds that personal jurisdiction exists over the Non-Resident Defendants.

It is therefore **ORDERED AND ADJUDGED** as follows:

1. The Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed by GTE Wireless Incorporated and GTE Wireless of the South Incorporated (Dkt. 72) **is GRANTED** in part and **DENIED** in part. The motion **is** granted as to count II and denied as to counts **I,** III, and IV.

2. The Dispositive Motion to Dismiss Plaintiffs' Third Amended Complaint filed by Defendants GTE Corporation, GTE Wireless of Houston Incorporated, GTE

Mobilnet of Cleveland Incorporated, and GTE Mobilnet of the Southwest Incorporated (Dkt. 74) is **DENIED.**

3. Under the doctrine of primary jurisdiction, the Court hereby **REFERS** count I to the Federal Communications Commission (FCC) for a decision. Plaintiffs are **directed** to file a petition for a determination of the issues contained in count I with the FCC. The Clerk of the Court shall certify a copy of the entire record in this case to be transmitted to the FCC.

4. The remaining claims are hereby **STAYED** pending a determination of the reasonableness of Defendants' billing practice of rounding up. The parties shall advise this Court of the FCC's ruling or other determination immediately.

5. **All** other pending motions including the motion for class certification (Dkt. 50) are **DENIED** with leave to refile after the FCC has rendered its decision.

6. The Clerk is directed to **administratively close** this case.

DONE AND ORDERED at Tampa, Florida, on this 21 day of October, 1999.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LINDA THORPE,

vs.

GTE CORPORATION, et al.
_____/

INDEX OF CASES AND MATERIELS IN SUPPORT OF PLAINTIFF'S PETITION FOR DECLARATORY RULING ON ISSUES CONTAINED IN "THORPE vs. GTE", UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, CASE NO. 8:00-CV-1231-T-17TBM

1. Comtronics, Inc. v. Puerto Rico Telephone Company
553 F.2d 701,708 (1st Cir. 1977)

2. American Inmate Phone System vs. US Sprint Communications
787 F.Supp.(N.D.Ill. 1992)

3. Weinberg v. Sprint Corp.
165 F.R.D. 431 (D.N.J. 1996)

4. In re Long Distance Telecommunications Litigation
831 F.2d 627,633 (6th Cir. 1987)

5. Bruss Company v. Allnet Communication Services, Inc.
606 F. Supp. 401 (N.D.Ill. 1985)

6. Kellerman v. MCI Telecommunications Corp.
112 Ill.2d 428, N.E. 2d 1045, 1051, 98 Ill. Dec. 24 (Ill. 1986)

7. American Inmate Phone System vs. US Sprint Communications
787 F.Supp. 852 (N.D.Ill. 1992)

8. Cooperative Communications v. AT&T Corp.
867 F.Supp. 1511 (D.Utah 1994)

9. Wisconsin Public Intervenor v. Mortier
111 S. Ct. 2476 (1991)

10. Cellular Dynamics. Inc. v. MCI Telecommunications Corporation
Case No. 94C3126, Northern District of Illinois, 1995 U.S. District LEXIS 4798

11. 47 U.S.C. § 251

Case #1

553 F.2d 701, *; 1977 U.S. App. LEXIS 14026, **;
40 Rad. Reg. *2d (P & F) 751*

COMTRONICS, INC., PLAINTIFF, APPELLANT, v. PUERTO RICO TELEPHONE COMPANY, ET AL., DEFENDANTS, APPELLEES

No. 75-1321

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

553 F.2d 701; 1977 U.S. App. LEXIS 14026; 40 Rad. Reg. 2d (P & F) 751

March 31, 1977

SUBSEQUENT HISTORY: [1]**

As Modified and Petition for Rehearing Denied May 18, 1977.

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT **FOR** THE DISTRICT OF PUERTO RICO. 409 F.SUPP. 800. HON. JOSE V. TOLEDO, U.S. District Judge.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant supplier appealed from an order of the United States District Court for the District of Puerto Rico dismissing its lawsuit for damages, declaratory, and injunctive relief for lack of jurisdiction, finding that no judicially created damages were available to appellant.

OVERVIEW: Appellee telephone company, without amending the applicable tariff, announced a policy of refusing to interconnect its equipment with customer-owned equipment that was supplied by appellant supplier. Appellant sued for damages and for declaratory and injunctive relief. The trial court dismissed the case for lack of jurisdiction. The court had previously held that appellee was bound by a tariff that permitted the interconnection of subscriber-owned and supplied telephone equipment. The court's conclusion that no judicially created damages were available to appellant was impelled by a clear legislative intent to preclude such a remedy. In light of the significant omissions, of damages liability, or a cause of action therefor, the court was reinforced in its belief that Congress intended that connecting carriers' violations of 47 U.S.C.S. § 203(b) not give rise to damages liability.

OUTCOME: The court affirmed the judgment of the trial court that no damages remedy was available to supplier.

CORE TERMS carrier, connecting, tariff, Communications Act, cause of action, common carrier, interconnection, interstate, legislative history, connecting carrier, telephone, consumer, supplier, exemption, physical connection, adhere, federal regulation, judicially created, regulatory scheme, statutory scheme, right of action, expressio, perceive, supplied, unius, duty, congressional intent, civil penalties, common carriers, carrier engaged

CORE CONCEPTS - Hide Concepts

Communications Law : Federal Acts : Communications Act

A common carrier which provides interstate telephone service is subject to all of the provisions of the Communications Act. However, the Act's application to a non-subsidiary connecting carrier, which is engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier is limited. Under 47 U.S.C.S. § 152(b), nothing in the Act shall be construed to apply or to give the Federal Communications Commission jurisdiction with respect to any connecting carriers except that §§ 201 to 205 shall apply.

Communications Law : Federal Acts : Communications Act

The Communications Act of 1934, 47 U.S.C.S. § 151 et seq., cannot be read as explicitly creating a damages remedy against a connecting carrier. Title 47 U.S.C.S. § 152(b) subjects the carrier to §§ 201-05 alone; the damages liability created by § 206 and the damages remedy authorized by §§ 207 and 209, therefore, do not apply to the carrier.

Communications Law : Federal Acts : Communications Act

No judicially created damages remedy is available to compensate for the harm caused an alleged violation of the Communications Act of 1934, 47 U.S.C.S. § 151 et seq.

Communications Law : Federal Acts : Communications Act

Consumers' rights to obtain cheaper and more efficient interconnection equipment cannot be vindicated unless suppliers, acting in reliance on the tariff, undertake the cost of providing such equipment. Indeed, a supplier's need for the assurance which a tariff provides is demonstrably more immediate and of greater weight than a consumer's.

Communications Law : Federal Acts : Communications Act

The court agrees that the enforcement scheme of the Communications Act of 1934, 47 U.S.C.S. § 151 et seq., vis a vis connecting carriers might be seriously flawed by the absence of a damages remedy. However, it is not for the court to expand the remedial scheme established by Congress unless expansion would be consistent with the evident legislative intent. In situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.

Communications Law : Federal Acts : Communications Act

Other portions of the legislative materials indicate to the court that its perception of a congressional intent to deny a damages remedy against connecting carriers is not erroneous.

Governments : Legislation : Construction & Interpretation

Expressio unius est exclusio alterius, i.e., when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. Although the United States Supreme Court has assigned differing weight to this principle in recent years. The court thinks that, at the least, the maxim of expressio unius has vitality where a private cause of action is provided in favor of certain plaintiffs concerning the particular provision at issue while no damages remedy is afforded another class of plaintiffs suffering the same harm. As a corollary, expressio unius should have some probative value with respect to

congressional intent where a damages remedy is provided against one class of defendants but not against another class violating the same statutory prohibition.

Communications Law : Federal Acts : Communications Act
In light of the significant omissions, of damages liability, or a cause of action therefor, in the present case, the court is reinforced in its belief that Congress intended that connecting carriers' violations of 47 U.S.C.S. § 203(b) not give rise to damages liability.

Governments : Legislation : Construction & Interpretation
A precisely drawn, detailed statute pre-empts more general remedies. Preemption is particularly apparent where Congress has adopted in the more detailed regulatory scheme a policy of exempting the defendant's actions from damages liability.

COUNSEL: Sigfredo A. Irizarry for Appellant.

Alberto Pico, with whom, Brown, Newsom & Cordova was on brief, for Appellees.

JUDGES: Coffin, Chief Judge, McEntee and Campbell, Circuit Judges. Coffin, Chief Judge.

OPINIONBY: McENTEE

OPINION: **[*703]** McENTEE, Circuit Judge.

This case arises from the same events as Puerto *Rico Telephone Co. v. FCC,* 553 F.2d 694 (1st Cir. 1977), in which we sustained a declaratory order of the Federal Communications Commission (FCC) holding that the Puerto Rico Telephone Company (PRTC) is bound by a tariff permitting the interconnection of subscriber-owned and supplied telephone equipment. The tariff in question, F.C.C. **No.** 263, provides in pertinent part:

> "§ 2.6.1 General Provision. Customer-provided terminal equipment may be used with the facilities furnished by the Telephone Company, for long distance message telecommunications service, as specified **[**2]** in 2.6.2 through 2.6.6 following."

Sections 2.6.2 through 2.6.6 describe the types of equipment which may be connected by subscribers and enumerate restrictions designed to prevent harm to telephone company equipment. Tariff No. 263 clearly authorizes interconnection of the equipment supplied by appellant Comtronics, Inc., viz. private branch exchange (PBX) facilities, switchboard equipment such as that used by hotels and large offices.

Appellee PRTC was privately owned in early 1974 at the time of its concurrence in Tariff NO. 263. Several months later, pursuant to legislation enacted by the legislature of Puerto Rico, PRTC was purchased by the Commonwealth and thereafter it was run as a publicly owned utility. n l In mid-1974, according to Corntronics' allegations, PRTC, without amending the pertinent tariff, announced a policy of refusing to interconnect its equipment with customer-owned equipment such as that supplied by Comtronics. Appellant sued for damages and for declaratory and injunctive relief, alleging violations by PRTC of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* and of Comtronics' rights to due process and equal protection **[**3]** under the fourteenth amendment. The district court dismissed for lack of jurisdiction. n2 409 **[*704]** F. Supp. 800 (D.P.R. 1975). We deferred ruling on Comtronics' appeal from that order *so* that we might consider this case in conjunction with

our review of the FCC's order holding PRTC bound to Tariff No. 263.

----------Footnotes----------

n1 In the pleadings filed with the district court and before the FCC, PRTC maintained that its concurrence in Tariff No. 263 did not survive the sale of the company to the Commonwealth. The FCC disagreed and we accept its finding in this respect. See *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694 at n.3 (1st Cir. 1977).

n2 The order of the district court might be more properly termed a dismissal for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). See *Carr* v. *Learner*, 547 F.2d 135 (1st Cir. 1976).

----------End Footnotes----------

I. The Communications Act Claim.

A common carrier such as AT&T which provides interstate telephone service is subject **[**4]** to all of the provisions of the Communications Act. However, the Act's application to a non-subsidiary "connecting" carrier, such as PRTC, which is "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier" is limited. Under 47 U.S.C. § 152(b), "nothing in [the Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . any [connecting] carriers . . . except that sections 201 to 205 shall . . . apply." Sections 201 through 205 provide, inter alia, that tariffs be "just and reasonable," § 201(b), and that connecting carriers publish and adhere to the tariffs in which they have concurred, § 203 (a) & (b). Section 203(e) establishes penalties for violations of these duties, and § 205 vests the FCC with enforcement power and provides penalties for violations of FCC orders.

Sections 201 through 205 make no mention of a damages remedy. However, § 206 provides that "any common carrier" violating the Act shall be liable in damages to the person injured thereby. Furthermore, § 207 enables a person injured by such a common carrier to bring an action for damages **[**5]** in the district court. Finally, §§ 208-09 provide a procedure whereby the FCC may order payment of damages by an offending common carrier.

In the present case, the district court noted that the Act does not explicitly create a cause of action for damages caused by PRTC's alleged violation of § 203(b)'s requirement that it adhere to its tariff permitting interconnection of PBX equipment. See 409 F. Supp. at 417. The court also reasoned that no federal common law remedy should be implied because the interest asserted by Comtronics was not protected by the Communications Act:

> "The Act does not impose any duty on PRTC with respect to plaintiff. It is only intended to establish the conditions upon which communications services of an interstate nature will be lawfully provided and thus only regulates the bilateral relationship between the carrier and its subscriber." Id.

We agree with the district court that the Act cannot be read as explicitly creating a damages remedy against a connecting carrier such as PRTC. Section 152(b) subjects PRTC to §§ 201-05 alone; the damages liability created by § 206 and the damages remedy authorized by §§ 207 and 209, **[**6]** therefore, do not apply to PRTC. But see Ward *v. Northern Ohio Telephone Co., 300* F.2d 816, 820 (6th Cir.), cert. denied, 371 U.S. 820, 9 L Ed. 2d 61, 83 S. Ct. 37 (1962).

We also conclude that no judicially created damages remedy is available to Comtronics to compensate for the harm caused by PRTC's alleged violation of the Communications Act. However, we reach this result for reasons which differ from those expressed by the district court. We disagree with the district court's implicit conclusion that Comtronics is not within the class protected by § 203(b)'s requirement that a carrier adhere to its tariffs until amendments are adopted in conformity with the procedural requirements of the Act. n3 Undoubtedly, the dominant purpose of the liberalized interconnection policy embodied in the tariff which PRTC allegedly abrogated was to benefit consumers of telephone services. See, *e.g.,* Puerto Rico Telephone **[*705]** Co. v. FCC, supra at n. 10; *Hush-a-Phone Corp.. v. United States,* 99 U.S. **App.** D.C. 190, 238 F.2d 266, 269 (1956); *Carterfone,* 13 F.C.C.2d 420, 424, reconsideration denied, 14 F.C.C.2d 571 (1968). **[**7]** However, consumers' rights to obtain cheaper and more efficient interconnection equipment cannot be vindicated unless suppliers, acting in reliance on the tariff, undertake the cost of providing such equipment. n4 *Cf. Barrows* v. *Jackson,* 346 U.S. 249, 97 L. **Ed.** 1586, 73 S. Ct. 1031 (1953); *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 477, 84 L. Ed. 869, 60 S. Ct. 693 (1940). Indeed, a supplier's need for the assurance which a tariff provides is demonstrably more immediate and of greater weight than a consumer's. Given the identity of interests between a supplier and consumer and the supplier's greater reliance on tariff guarantees, we think that Comtronics is within the class of intended beneficiaries protected by § 203(b).

----------Footnotes----------

n3 Under the principles enunciated by the Supreme Court in Cort *v.* Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975), an implied remedy is not available to a plaintiff who is not "one of the class for whose especial benefit the statute was enacted." *Id.* at 78, quoting *Texas & P.R. Co. v. Rigsby,* 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916) (emphasis deleted). Accord, *Piper* v. *Chris-Craft Indus., Inc.,* 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124, 45 U.S.L.W. 4182, 4192 (1977). **[**8]**

n4 In the context of agency action, it is noteworthy that consumers' rights under the policy of liberalized interconnection have been enforced primarily through actions brought by suppliers. *E.g., Carterfone,* 13 F.C.C.2d 420, reconsideration denied, 14 F.C.C.2d 571 (1968); Hush-a-Phone Corp., 22 F.C.C. 112 **(1957),** on remand from 99 U.S. App. D.C. 190, 238 F.2d 266 (1956).

----------End Footnotes----------

Our conclusion that no judicially created damages remedy is available is impelled by what we perceive as a clear legislative intent to preclude such a remedy. We agree with our dissenting brother that it is unfortunate that economic harm flowing from PRTC's asserted violation of the Act should go unrernedied. We also agree that the enforcement scheme of the Communications Act vis a vis connecting carriers might be seriously flawed by the absence of a damages remedy. *Cf. Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124, 45 U.S.L.W. 4182, 4193 (1977); *J.I. Case* Co. *v. Borak,* 377 U.S. 426, 433, 12 *L.* **Ed.** 2d 423, 84 S. Ct. 1555 (1964). **[**9]** However, it is not for us to expand the remedial scheme established by Congress unless expansion would be "consistent with the evident legislative intent." *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers,* 414 U.S. 453, 458, 38 L. Ed. 2d 646, **94** S. Ct. 690 (1974). "In situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling." Cort v. *Ash,* 422 U.S. 66, 82, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). Turning to the statute before us and its legislative history, we perceive such "an explicit purpose to deny [a] cause of action."

Section 206 provides:

> "In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained. . . ."

Section 153(h), in turn, defines a "common carrier" as "any person engaged as a **[**10]** common carrier for hire, in interstate or foreign communication by wire or radio . . . except where reference is made to common carriers not subject to this chapter."

By its literal terms, therefore, § 206 reaches PRTC as well as such pre-eminent common carriers as AT&T and ITT. However, as noted above, § 152(b) provides that "nothing in this chapter shall be construed to apply . . . to . . . any [non-subsidiary] carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier . . . except that sections 201 to 205 of this title shall . . . apply. . . ." Thus, a "connecting" carrier such as PRTC is explicitly removed from the class of carriers against which damages liability is created. The necessary implication is that Congress chose to shield "connecting" carriers from damages liability. This reading of the language of the statute is, we think, borne out by the legislative history of the Communications Act of 1934.

As originally reported by the Senate Commerce Committee, the Communications Act provided no specific exemption for "connecting" carriers from any of the Act's **[*706]** provisions. Rather, in the words **[**11]** of the committee chairman, "we have tried . throughout the bill . . . to protect the independent companies." 78 Cong. Rec. 8847 (remarks of Senator Dill). Nevertheless, the Senate, without objection, adopted an amendment providing a total exemption for connecting carriers:

> "(b) Nothing in this act shall be construed to apply or to give the commission jurisdiction with respect to charges, classifications, practices, or regulations for or in connection with intrastate communication service of any carrier, or to any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by such carrier, or under direct or indirect control with such other carrier." ***Id.*** at 8846.

Thus, as the bill passed the Senate, it was contemplated that "connecting" carriers would be wholly free of the Act's restraints.

In the House Committee, the Senate-passed exemption was modified:

> "The [House] amendment retains this provision except that it makes such carriers subject to sections 201 and 205, providing for the regulation of charges and prohibiting discrimination. **[**12]** " H.R. Rep. No. 1850, 73d Cong., 2d Sess. at 2 (1934).

Accord, **78** Cong. Rec. 10313 (remarks of Representative Rayburn). With the exemption thus amended, the bill was enacted. **48** Stat. **1064.** See 47 U.S.C. § 152**(b).**

From this review of the legislative history, it is clear to us that Congress, working against the backdrop of a proposed total exemption for "Connecting" carriers, chose to go no further than to subject a company such as PRTC to §§ 201-05. We must assume that the legislative draftsmen were conscious of the nearby § 206 and that when they provided that it shall not "apply," § 152(b), they meant that damages liability shall not apply.

Other portions of the legislative materials indicate to us that our perception of a congressional intent to deny a damages remedy against connecting carriers is not erroneous. For example, Representative Rayburn, Chairman of the House Commerce Committee, explained the creation of civil penalties for violations of § 202:

> "Section 202(c) is a penal provision which will apply to those small independent companies made subject to sections 201-205 inclusive, but exempted from the other provisions **[**13]** of the act under [§ 152(b)]." **78** Cong. Rec. **10313.**

We think it likely that the "other provisions" to which Chairman Rayburn contrasted § 202 (c) are the damages provisions of §§ 206-09, and that his remarks may be taken to reflect a congressional intent that the civil penalties of § 202(c) and the other penalty and FCC order provisions of §§ 201-05 were to be the exclusive method of enforcing the Act with respect to connecting carriers.

Our reading of the statute as precluding a damages remedy is also consistent with the legislative purpose in excluding connecting carriers from most of the Act's provisions. The primary purpose of the 1934 Communications Act was to subject the burgeoning power of such near-monopolies as AT&T to more effective federal regulation. See 78 Cong. Rec. **10315** (remarks of Representative Rayburn). In contrast, the purpose of the Senate's total exclusion of "connecting" carriers was to exempt tiny, mostly rural telephone companies from federal regulation. **78** Cong. Rec. **8846** (remarks of Senator Clark). The House amendment subjecting such companies to §§ 201-05 likely represented a compromise between a desire to free such small businesses of **[**14]** federal regulation and a practical realization that a minimum of federal control was necessary to regulate that portion of the local companies' business which was interstate. Since Congress in **1934** perceived "Connecting" carriers as weak, rural exchanges, it seems likely that Congress was reluctant to subject such companies to damages liability. Congress might have concluded instead that the civil penalties provided in §§ 201-05 would be sufficient to insure compliance with federal law. In the four decades since the Communications Act was passed, "Connecting" carriers have **[*707]** come to include such a large enterprise as PRTC, against which the penalties provided in §§ 201-05 might prove ineffective. It is for Congress, however, and not for this Court, to rewrite the statute to reflect changed circumstances. See *Martinez Hernandez v. Air France,* 545 F.2d 279, 284 (1st Cir. 1976).

Finally, our interpretation of Congress' intent in **1934** is aided by the principle of statutory construction *expressio* unius est *exclusio alterius, i.e.,* "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to **[**15]** subsume other remedies." *National Railroad Passenger Corp., supra.* Although the Supreme Court has assigned differing weight to this principle in recent years, compare id. ***with*** *Cort v. Ash, supra* at *82* n. 14, we think that, at the least, the maxim of expressio unius has vitality where "a private cause of action [is] provided in favor of certain plaintiffs concerning the particular provision at issue" while no damages remedy is afforded another class of plaintiffs suffering the same harm. Id. As a corollary, expressio unius

should have some probative value with respect to congressional intent where a damages remedy is provided against one class of defendants but not against another class violating the same statutory prohibition. ***See*** *T.I.M.E., Inc. v. United States,* 359 U.S. 464, 470-71, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959) (Harlan, J.). "In light of the "significant omissions," *id.* at 471, of damages liability, or a cause of action therefor, in the present case, we are reinforced in our belief that Congress intended that "connecting" carriers' violations of § 203 (b) not give rise to damages liability. **[**16]** n5

----------Footnotes----------

n5 We need not decide Comtronics' claim to declaratory and injunctive relief. Our affirmance in *Puerto Rico Tel. Co. v. FCC, supra,* upholding the FCC's finding that PRTC was bound by the tariff and its order that it adhere to its published tariff is the equivalent of such relief.

----------End Footnotes----------

II. ***The Fourteenth Amendment Claim.***

Comtronics also pleaded a cause of action based on the fourteenth amendment, claiming that PRTC had deprived it of its property in violation of due process and equal protection. Appellant's action under the fourteenth amendment raises a number of troubling issues. To resolve its claim, it would be necessary to decide, for example, whether PRTC's tariff filed with the FCC constituted "property" of Comtronics within the meaning of the fourteenth amendment, ***see, e.g.,*** Board of *Regents v. Roth,* 408 U.S. 564, 569, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Medina v. Rudman,* 545 F.2d 244 (1st Cir. 1976), and whether a state-owned utility such **[**17]** as PRTC is a "person" against whom a claim may be stated under 42 U.S.C. § 1983. ***See, e.g.,*** *City of Kenosha v. Bruno,* 412 **U.S.** 507, 511-13, 37 L. **Ed.** 2d 109, 93 S. Ct. 2222 (1973). And, if we were to conclude that Comtronics could not bring an action against PRTC under § 1983, it might be necessary to decide whether a judicially created remedy under the fourteenth amendment was available. Cf. *Mt. Healthy Board of Education v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L. **Ed.** 2d 471, 45 U.S.L.W. 4079, 4080 (1977); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

However, we need not reach these difficult questions. Congress has subjected PRTC'S actions as a carrier to the detailed regulatory scheme of the Communications Act. In such circumstances, the "precisely drawn, detailed statute pre-empts more general remedies." *Brown v.* GSA, 425 U.S. 820, 834, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976). Pre-emption is particularly apparent, we think, where, as here, Congress has adopted in the more detailed regulatory scheme **[**18]** a policy of exempting the defendant's actions from damages liability. n6 *Cf. Preiser* v. *Rodriguez,* 411 U.S. 475, 489-90, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973).

----------Footnotes----------

n6 Section 414 of the Communications Act provides:

> "Nothing in this Act contained any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

While we may concede that § 414 would not deprive anyone of an independent action under

§ 1983, any viable **§ 1983** action here would be based on property rights alleged to have been created under the Communications Act. As such, a **§ 1983** action would be no more than an additional remedy for a violation of a duty created by the Communications Act. Because we hold that Congress withheld a damages remedy under the Act against connecting carriers (and as our brother Coffin's dissent indicates the question is concededly not open and shut), we think it would make little sense to hold that a damages remedy exists against them under **§ 1983** for violations of the very same Act. The "existing" remedies Congress had in mind under § 414 would scarcely be remedies ***so*** closely dependent upon the Act itself; rather, we read § 414 as preserving causes of action for breaches of duties distinguishable from those created under the Act, as in the case of a contract claim. Cf. ***Ivy*** Broadcasting Co. *v.* American *Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968); *Kaufman* v. *Western Union Tel. Co.*, 224 F.2d 723 (5th Cir. 1955), cert. denied, 350 U.S. 947, 100 L. Ed. 825, 76 S. Ct. 321 (1956); *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539 (1st Cir. 1940).

- - - - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - - - **[**19]**

[*708] For these reasons we conclude that no damages remedy is available to Comtronics.

Affirmed.

[*709contd] [EDITORS NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

In its petition for rehearing and for clarification, Comtronics argues first that our assumption that PRTC is a **"** connecting carrier" is premature inasmuch as discovery is necessary to determine whether PRTC is exempted from all but §§ 201-05 as a

> "carrier engaged in interstate . . . communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier". 47 U.S.C. § 152(b)(2).

But we do not think that the determinative question is whether the facilities through which interstate commerce is conducted are **[*710]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents. **[**20]**] under common control. See Brief of Comtronics at 40; Petition for Rehearing and for Clarification at **3.** The correct reading of § 152(b)(2) seems to be that the "not directly" language modifies "carrier", **i.e.** a connecting carrier is one which has a fully independent identity. If the language modified "facilities", then "facilities" would "control" another carrier - an incomprehensible construction. The focus of the section is not on the joint control of facilities but on joint control of carriers. Such a reading is consistent with the legislative history which indicates concern for exempting small, independent telephone companies from most of the Act's strictures. As Comtronics stated in its complaint that PRTC "is a wholly owned subsidiary of the Telephone Authority of Puerto Rice . . . which in turn is a corporate public instrumentality of the Commonwealth of Puerto Rico", we think it reasonable to assume that PRTC is a "connecting carrier" under § 152(b)(2).

This understanding is reinforced by the fact that the district court's opinion was expressly based on the assumption that PRTC is a "connecting carrier", and Comtronics' argument on

appeal accepted this premise [**21] with the exception of two passing sentences at the beginning of page 40 of its brief. The issue was never raised and addressed frontally on appeal. See also *Puerto Rico Telephone Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977).

DISSENTBY: COFFIN

DISSENT: [*708contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

COFFIN, Chief Judge, dissenting.

Were ours the first judicial effort to interpret these statutes, the court's opinion might well carry the day for me. But, on a close issue of interpretation, I admit to being influenced by the fact that the only authority on point, *Ward* v. *Northern Ohio* Telephone *Co., 300* F.2d 816 (6th Cir. 1962), is contrary. While I would not follow Ward to the extent of effectively implying a right of action for all violations of §§ 201-205, it seems to me that when we add its solitary and long-standing authority to the essentiality of a private damages action for the carrying out of the policies embodied in § 203, the consistency of such an action with the statutory scheme, and the [**22] opaqueness of the legislative history, the balance tips in favor of the action.

The consequences of the court's holding are illustrated by the facts of this case. Here, PRTC's tariff required that it permit the interconnection of privately owned telephonic equipment in accordance with a long-standing FCC policy. If PRTC had been disposed to comply with § 203 when it decided that this provision was too burdensome, it would have proposed a change in its tariff to the FCC at least thirty days before the effective date thereof. We may safely assume that the FCC would have denied this request sometime before the effective date. Companies like Comtronics would then have been spared the substantial financial losses they allegedly incurred, and the consumers of PRTC's services would not have been temporarily denied the benefits of the interconnection policy. It is easy to see that § 203 is a key feature of the regulatory scheme; it enables the FCC to secure continuous carrier compliance with critical FCC policies.

The court's holding today creates an incentive for connecting carriers to disregard the specified procedures for amending their tariffs. By ignoring § 203 and unilaterally amending [**23] its tariff to give itself a monopoly, PRTC bestowed an immense financial benefit on itself and caused enormous, perhaps irreparable, damage to its competitors. I have no difficulty assuming that the net financial advantage flowing to PRTC from the violation was greatly in excess of the maximum civil penalty which could be imposed, see § 203(b). I have no reason to doubt that other tariff violations will often be similarly profitable. Since the court refuses to imply a damages remedy, companies like PRTC will hereafter have a positive incentive to violate certain provisions of their tariffs. I cannot believe that Congress could have contemplated that the FCC's ability to secure continuous compliance with its tariffs was to depend on how lucrative the violations thereof were to be. n l

----------Footnotes----------

n1 The fact that Comtronics could have sought a cease and desist order from the FCC under § 205 does not alter the analysis. Because the FCC has limited resources and myriad of regulatory responsibilities, it is not likely that Comtronics could have secured instant relief. More significantly, it is quite possible that there will also be instances in which the likely financial advantage from the continuation of the violation will also exceed the maximum penalties for violating the cease and desist order.

----------End Footnotes---------- [**24]

[*709] The court seems to recognize that the creation of a private damages remedy would eliminate the enforcement problem, but it believes that Congress has precluded the creation of such actions. Unlike the majority, I see no evidence of "an explicit [legislative] purpose to deny such cause of action." Cort v. Ash, 422 U.S. 66, 82, 45 L. Ed. 2d 26, 95 S Ct. 2080 (1975), and I believe such a remedy would be consistent with the statutory scheme.

For present purposes, I am willing to assume that Congress intended that §§ 206-07 should not apply to connecting carriers. However, it does not follow that Congress specifically intended that connecting carriers should be immune from damages liability under each and every statutory provision. All that can reasonably be inferred from Congress' decision to exempt connecting carriers from §§ 206-07 is that Congress did not want to subject connecting carriers to the automatic, across-the-board damages liability of common carriers. Whether there is to be a private right of action under any of the specific provisions seemingly has been left to judicial determination. Since I see nothing in the legislative history [**25] which is to the contrary n2 and can perceive no regulatory objective or substantial value which will be interfered with if private damages actions were allowed under § 203 alone, n3 I think the inferral of this damages remedy is consistent with the "evident legislative intent". Because this remedy, in my view, is necessary to protect the primary legislative objectives and since there are not other considerations counseling against the creation of such a remedial right, see Cort v. Ash, supra at 78, this is an appropriate case for the exercise of the very respectable judicial practice - evidenced by literally scores of cases - of implying a private right of action under a statute which does not expressly provide for one. I would reverse the judgment of the district court.

----------Footnotes----------

n2 The history the majority relies upon is less than compelling. Although Congress demonstrated solicitude for the financially weaker connecting carriers, it made them subject to §§ 201-05, and there is no indication that Congress felt that connecting carriers should be given a carte blanche to violate the procedures for having their tariffs amended. Representative Rayburn's statement during floor debate obviously recognizes the applicability of § 202(c) to connecting carriers. It also notes that such carriers are subject to §§ 201-05, but not to other provisions. But it is not addressed to the problem of what happens when such a carrier violates a key provision, like § 203, to which the carrier is subject. [**26]

n3 Lest there be any doubt that I would take seriously the Congressional solicitude for the financially weaker connecting carriers, I would be strongly disinclined to imply a damages action under § 201 of the Act, which proscribes "unjust and unreasonable practices". Because any carrier practice can be so characterized, permitting such actions against connecting carriers could subject them to numerous lawsuits which would not arise from the carriers' intentional, unlawful conduct. The defense of these lawsuits would place an enormous strain on the connecting carriers even in instances in which the carriers' conduct was blameless, and for this reason my tentative feeling is that a damages remedy under § 201 would be inconsistent with the statutory scheme. In contrast, a connecting carrier can easily avoid subjecting itself to suit under § 203 simply by following the prescribed procedure.

----------End Footnotes----------

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Case #2

*787 F. Supp. 852, *; 1992 U.S. Dist. LEXIS 5452, **;
70 Rad. Reg. 2d (P & F) 1387*

AMERICAN INMATE PHONE SYSTEMS, INC., Plaintiff, v. US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, Defendant.

Case No. 91- C 5948

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

787 F. Supp. 852; 1992 U.S. Dist. LEXIS 5452; 70 Rad. Reg. 2d (P & F) 1387

March 31, 1992, Decided
April 1, 1992, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff phone systems corporation filed a two-count complaint in state court seeking relief based on Illinois law. Defendant, a communications limited partnership, removed the action to the court, claiming that federal law preempted the phone systems corporation's state-law claims. The phone systems corporation filed a motion to remand the action to state court pursuant to 28 U.S.C.S. § 1447(c) and sought attorney fees for wrongful removal.

OVERVIEW: The phone systems corporation's state court complaint against the communications limited partnership alleged breach of a verbal agreement and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121-1/2, para. 261 et seq. The communications limited partnership removed the action to federal court, claiming federal question jurisdiction under the Communications Act, 47 U.S.C.S. § 151 et seq. The court granted the phone systems corporation's motion to remand, holding that the court lacked federal question subject matter jurisdiction because the phone systems corporation's claims for breach of a verbal contract and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act did not state a federal claim and were not preempted by the federal law. The court denied the phone systems corporation's 28 U.S.C.S. § 1447(c) motion for attorney fees and expenses incurred in responding to the communications limited partnership's removal, holding that there was no indication that the communications limited partnership acted in bad faith.

OUTCOME: The court granted the phone systems corporation's motion for a remand but denied its request for attorney fees.

CORE TERMS: Communications Act, removal, preemption, state-law, federal question, preempted, federal law, duty, verbal contract, Deceptive Business Practices Act, breach of contract, causes of action, subject matter jurisdiction, state law, telephone, breached, diversity jurisdiction, federal claim, savings clause, original jurisdiction, distinguishable, citizenship, interstate, interfere, preempt, common carrier, partnership, fraudulent, preserved, surcharges

CORE CONCEPTS - ◆ Hide Concepts